No. 77-665

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN PITCAIRN, AGENT FOR SHAREHOLDERS OF AUTOGIRO COMPANY OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM FOR THE UNITED STATES

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Solicitor General,

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1. Contrary to respondent's contention (Br. in Opp. 7-14), the petition for a writ of certiorari was timely filed. The pertinent statute—28 U.S.C. 2101(c)—provides that "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Here, the final judgment of the Court of Claims was entered on July 12, 1977 (Pet. App. D, *infra*, pp. 113a-115a). By order dated October 6, 1977, the Chief Justice extended the time for filing a petition for a writ of

certiorari to and including November 9, 1977, and the petition was filed on that date. Hence, the petition for a writ of certiorari was timely applied for—*i.e.*, it was filed (28 U.S.C. 2101(c)) within the extended period "not exceeding sixty days" from the date "ninety days after the entry" of the judgment of the Court of Claims.

Respondent argues (Br. in Opp. 7-14) that the government's time for seeking certiorari ran from the date of the Court of Claims' opinion and not from its judgment.[1]

But the Court rejected the identical argument in *United States* v. *Bianchi & Co.*, 373 U.S. 709. There, the Court of Claims rendered a decision as to liability and entered a final judgment assessing damages two and one-half years later. The government sought certiorari from the final judgment and the respondent urged that the petition was untimely. However, this Court granted certiorari (371 U.S. 939) and decided the merits (373 U.S. 709),

[1]That opinion, entered December 15, 1976, concluded (Pet. App. B 71a-72a) that respondent "is entitled to recover from the United States in accordance with the opinion. Judgment is entered for the plaintiff to that effect. The amount of recovery, including both the basic amount of compensation and the delay compensation, will be determined pursuant to Rule 131(c) * * *" of the Court of Claims.

Under the Court of Claims practice, this meant that the case had to be remanded to the trial judge for further inquiry into the amount to be recovered, and that the court's final action could not and would not be taken until the trial judge had made his determination, and, if necessary, the court had reviewed that decision. In this case, there was still a considerable controversy over the computation of the judgment. But even if the post-opinion proceedings were routine, the action of the Court of Claims was not final until the trial judge had acted, and the Court of Claims had entered its judgment, which it did on July 12, 1977 (Pet. App. D, pp. 113a-115a). This practice of the Court of Claims has been described by the clerk of that court in Peartree, *Statistical Analysis of the Court of Claims*, 55 Georgetown L. J. 541, 547, and n. 38 (1966).

notwithstanding the argument presented by the respondent in its brief in opposition, and answered by the government in a reply memorandum (No. 529, October Term, 1962) that the time for filing the petition expired 90 days after the Court of Claims' decision as to liability.[2] It is therefore well established that a petition for a writ of certiorari to review a decision of the Court of Claims is timely if filed within the statutory period following the final judgment fixing the amount of damages.

The government no doubt could have filed a petition upon the entry of decision here on December 15, 1976, and indeed contemplated doing so. That, however, is not because the entry of decision constitutes a "final judgment," but because this Court may review both interlocutory and final decisions of the Court of Claims. See, *e.g.*, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394; *United States* v. *Adams*, 383 U.S. 39, 41-42; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155; *United States* v. *Caltex, Inc.*, 344 U.S. 149; *Marconi Wireless Co.* v. *United States*, 320 U.S. 1. See also Stern & Gressman, *Supreme Court Practice*, pp. 71-72 (4th ed. 1969). This flexibility is emphasized by the wording of the statute governing review of cases in the Court of Claims. Thus, 28 U.S.C. 1255, states: "Cases in the Court of Claims may be reviewed by the Supreme Court by * * * writ of certiorari * * *." It carefully avoids

[2]Likewise, in *United States* v. *Estate of Grace*, the Court granted certiorari (393 U.S. 975) and decided the merits (395 U.S. 316), despite the argument advanced by the respondent in its brief in opposition, and answered by the government in a reply memorandum (No. 574, October Term, 1968) that the time for filing the petition expired 90 days after the issuance of the Court of Claims' opinion.

limiting review to "final judgments of degree," the language used in 28 U.S.C. 1257 to define this Court's jurisdiction to review State court decisions.[3]

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[3]*Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, upon which respondent relies (Br. in Opp. 10-12, 14), is irrelevant. There, the court of appeals entered a final judgment that reversed the single contested part of a three-part Federal Trade Commission cease and desist order, but did not mention the two uncontested parts. The Commission filed a memorandum several weeks after the time for a petition for rehearing had elapsed, asking that the uncontested parts be enforced. The court of appeals then entered another judgment reiterating the reversal of the first part and affirming and providing for the enforcement of the other two parts. More than 90 days after the entry of the first judgment, the Commission sought certiorari to review the judgment reversing the only contested part of its order. In dismissing the writ as untimely sought, this Court held only that once a final judgment is entered, the time for petitioning may not be enlarged except by a timely petition for rehearing or by a subsequent decree that (*id.* at 211) "changes matters of substance, or resolves genuine ambiguity."

Here, however, the Court of Claims' opinion stated no money amount. It was only the judgment of July 12, 1977, that contained the operative order against the government in this case. It provided that the respondent was entitled to recover "fourteen million, four hundred and forty thousand, seven hundred and seventy-two dollars ($14,440,772), plus sixteen million nine hundred and eighty-two thousand, three hundred and sixty-two dollars ($16,982,362) delay compensation up to and including June 30,1977 * * *" "plus further delay compensation to be computed" on the principal sum "at a delay compensation rate of 7.5 percent per annum" (Pet. App. D, p. 114a).

Department of Banking v. *Pink*, 317 U.S. 264, cited by respondent (Br. in Opp. 10-12), is likewise distinguishable. There, the Court held that the time within which to seek certiorari to review a final judgment of the New York Court of Appeals runs from the rendition of the judgment of that court, not from the date when, under the local practice, judgment was entered on remittance in the lower state court. Here, the only judgment under review is the judgment of the Court of Claims entered on July 12, 1977, and that is the relevant date for purposes of seeking certiorari.

2. With respect to the merits, respondent attempts to reduce the holding of the Court of Claims to a factual determination by asserting (Br. in Opp. 27) that the court determined the two percent royalty rate to be reasonable "after having reviewed and analyzed Autogiro's licensing history from 1932 through 1947 * * *." But the recovery period ran from November 1946 to May 1964, during which time respondent received a royalty of $500 per aircraft to and including December 31, 1948, and then sold a paid-up license for a net price of $120,000.[4] In these circumstances, there was no basis for the Court of Claims's conclusion that respondent's "reasonable and entire compensation" from the government's unlicensed use of its patents was $14.4 million, based upon a two percent rate that never became effective and that respondent never obtained.

Respondent further argues (Br. in Opp. 21) that the government cannot be heard to complain of the Court of Claims' use of the two percent rate as the measure of the royalty compensation because the government itself introduced the unimplemented two percent agreement into evidence. But as respondent acknowledges (Br. in Opp. 17-18), it asserted in the court below that it was entitled to royalty compensation based upon an established rate of 3.85 percent, and indeed, the trial judge had upheld that claim (see Pet. App. A 1a-31a). The fact that the government introduced into evidence the unimplemented two percent agreement in order to place a

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[4]Respondent (Br. in Opp. 31) errs in asserting that the government did not object to the trial judge's exclusion of the evidence of its offer to United and its acceptance of United's counter-offer to take a fully paid-up license. The government did object to the trial judge's ruling (see Tr. 8121-8124). We are lodging with the Clerk copies of the relevant transcript pages. See also Pet. 5, n. 4.

ceiling upon respondent's recovery does not detract from our argument that respondent's "reasonable and entire compensation" may not be measured by licensing offers that were not accepted and by a licensing agreement's royalty provision that never became effective.

CONCLUSION

For the reasons stated above and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1978.

DOJ-1978-01